Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1974

No. 74-1490

S & H PACKING CO., INC., a California corporation,

Petitioner,

vs.

CESAR DE SARACHO and FERNANDO DE SARACHO, dba SARACHO HNOS.,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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Dated: May 27, 1975.

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CESAR DE SARACHO and FERNANDO DE SARACHO, dba SARACHO HNOS.,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above entitled case on March 21, 1975.

Citations to Opinions Below.

No opinion was filed by the District Court and the Memorandum Opinion of the United States Court of Appeals for the Ninth Circuit is printed in the Appendix hereto and has not been published. A timely Petition for Rehearing was denied by the United States Court of Appeals for the Ninth Circuit on April 21, 1975.

Jurisdiction.

The jurisdiction of the United States District Court arose under the provisions of 28 USC 1332; the jurisdiction of the United States Court of Appeals for the

Ninth Circuit was in accordance with 28 USC 1291 and the jurisdiction of this Court is set forth in 28 USC 1254(1).

Questions Presented.

1. Whether it is a denial of due process of law under the Fourteenth Amendment to the federal constitution to refuse to enforce a modification of written agreements by executed oral agreement upon the payment of a valid consideration in a situation where there is no conflict in the evidence concerning the execution of the modification of the written agreements or the support thereof by a valid consideration under state law.

2. Whether there has been a denial of due process of law to a litigant by entering a judgment against it for an amount of money which is, in effect, owed to it by the judgment creditor in the face of uncontradicted evidence that the written agreements relied upon by the lower court were, in fact, modified, which modification was supported by a consideration.

There Is No Statute Involved.

There is no Arizona statute involved, but the due process provision of the Fourteenth Amendment to the United States Constitution is of importance to the resolution of the legal problem here presented.

Statement of the Case.

The facts in this case are simple, uncontested and shocking:

Respondents, Mexican nationals, filed an action in the United States District Court for the District of Arizona against Petitioner, a California corporation duly licensed to transact business in the State of Arizona,

arising out of certain written agreements entered into between the parties wherein and whereby the parties dissolved and terminated a partnership which involved the growing of tomatoes and other agricultural crops in Mexico. Respondents' complaint was in four causes of action but the evidence at the time of trial was limited to only one cause of action.

Petitioner set up as a special defense for declaratory relief the execution of an oral agreement wherein and whereby the basic written agreements of the parties were modified and a declaration of the rights, duties and obligations of the parties was sought. The learned District Judge entered judgment against Petitioner for $267,199.42, despite the fact that the record without contradiction established that Respondents owed Petitioner $180,000.00, evidenced by three promissory notes providing for interest and attorney's fees, which were then and there owing but not yet due. The District Court flew in the face of uncontradicted evidence that the written agreements had been modified by the payment of new consideration of $125,000.00 in cash and the prepayment of over $400,000.00 in crop proceeds prior to the date the same would have been due except for the oral modification of the written agreements.

A little further detail is necessary to fully understand the factual situation with which we are dealing. On December 31, 1970 Petitioner and Respondents entered into a written agreement whereby Petitioner agreed to sell its partnership interest to Respondents in a Mexican tomato growing enterprise for the sum of $303,000.00, payment therefor to be represented by a series of promissory notes bearing interest at the rate of 4% per annum, most of which notes became due and payable in $60,000.00 annual installments be-

tween March 31, 1971 and December 31, 1975. Said agreement was amended by written document executed by the parties on January 15, 1971. At or about the same time said written agreements were entered into the parties entered into an oral agreement wherein and whereby Petitioner was to continue to handle the 1970-1971 tomato crop to be grown by Respondents in Mexico. Respondents were to ship their tomatoes to Petitioner as a commissioned agent and Petitioner agreed to advance the necessary funds to finance the growing, harvesting, transportation and other expenses in connection with said crop and would sell said tomatoes and remit the proceeds to Respondents at the end of the growing season and give an accounting at that time, which was estimated to be on or about June 1, 1971. Petitioner was to receive a 10% commission on the total dollar volume of the gross sales and would recoup out of the sale of the crop its advances, for which it would reimburse itself out of the first monies received. The total gross sales for said crop during said season were close to $3,000,000 and the net proceeds of said sales were close to $2,000,000. The advances made by Petitioner during said period amounted to almost $1,400,000.

In March of 1971 Respondents made what appeared to Petitioner to be unreasonable financial demands and desired an accounting prior to the end of the growing season. Respondents also demanded further cash advances unrelated to the growing of the crop which Petitioner refused to make. On or about March 31, 1971 Petitioner, acting through its president, Robert L. Horwath, met with Respondents in Nogales, Arizona, at which time Respondents demanded large sums of cash and actually had stopped the shipment of tomatoes

at the border. Mr. Horwath informed Respondents that he would advance them $125,000.00 in cash at that time which they would be required to repay at the rate of $25,000.00 per week out of the proceeds of the sale of the tomatoes during the next five weeks. He further stated that instead of holding all of the funds resulting from the sale of the tomatoes until June 1 he would advance the monies as they came in, provided that Respondents would agree to pay the entire balance due under the December 31, 1970 written agreement during the current growing season and that the notes which were to mature between December of 1971 and December 1975 would be paid in full by the end of the growing season. There is no question but that Respondents refused this offer, left the meeting and went their way. The District Court's finding thus far is correct. Petitioner thereupon directed its employees to close its packing shed in Nogales, Arizona and to cancel all of its orders and to leave Nogales. Mr. Horwath returned to his home in Los Angeles. The District Court failed to find on the uncontradicted record that the following morning one of the Respondents came to the packing shed and said, "We want the $125,000.00. When can we get it?" Contemporaneously therewith the tomato trucks again commenced rolling to the Nogales packing shed. A call was made to Mr. Horwath in Los Angeles who arranged to have the checks issued which were delivered that very day. The repayment of the $125,000.00 advance was made in the manner set forth above. In addition to that, between April 4 and the end of May $400,000.00 was paid to Respondents in accordance with the offer made by Mr. Howarth. Based upon this hornbook factual situation the trial court did not make a finding of an executed oral agree-

ment. Obviously, there was a full and complete acceptance of the offer, compliance therewith and the acceptance of adequate consideration by Respondents. This is almost like the classic law school example of offer and acceptance where A lives across the river from B and A tells B that he wants to accept his offer to light a fire at 8:00 o'clock that night. B lights the fire, but it is a foggy evening and A can't see the fire. The acceptance of the offer was made in accordance with the terms set by the offeror and there is, of course, a binding agreement. In the case at bar the Court became confused apparently because Respondents walked out of the meeting when the offer was first made, but everyone has forgotten that the offer was accepted in the most obvious manner the next day by asking for the $125,000.00 advance and resuming the shipment of tomatoes which had ceased the previous day.

It is Petitioner's position that the foregoing factual situation is without contradiction and that it is also uncontradicted that the Respondents' notes, each in the sum of $60,000.00, carrying interest and attorney's fees, due December 31, 1973, December 31, 1974 and December 31, 1975, have not been paid and that Petitioner is the owner and holder thereof. It is also obvious and clear that if this money of Petitioner's is collected in Arizona and taken into Mexico a grave injustice will occur to Petitioner and Petitioner will be deprived of its funds as the result of a miscarriage of justice.

REASONS FOR GRANTING THE WRIT.

I.

A Grave Miscarriage of Justice Results From Respondents Obtaining a Judgment for $180,000.00 With Interest on Money Due and Owing by Respondents to Petitioner.

The trial court rejected a finding of executed oral agreement which the Court of Appeals affirmed by stating, "The evidence presented by the parties was conflicting." There was no conflict in the evidence of any kind. When the offer to advance the additional $125,000.00 was made and the further offer to expedite the payment of crop proceeds was made, there is no question but that Respondents refused the offer, stopped the shipments and Petitioner prepared to shut down its Nogales operation. Nobody questions that the very next day one of the brothers Saracho appeared to pick up the $125,000.00, that the tomato trucks started moving to the shed again and that over $400,000.00 was paid prior to June 1, 1971 on sales made by Petitioner. The only conflict that arose was after they got the money and then sought legal advice to enable them to contest the facts as they actually occurred. The trial court confused the facts as they existed at the time the transaction occurred and the way Respondents wanted to make the facts appear when they got into the courtroom.

II.

Arizona Law Re Executed Oral Agreements.

Arizona law uniformly recognizes that a written agreement may be modified by a subsequent oral agreement.

American Eagle Fire Ins. Co. v. McKinnon, (1930) 36 Ariz. 409, 286 Pac. 183;

In re Estate of MacDonald, (1966) 4 Ariz. App. 94 at 97, 416 P. 2d 782.

That jurisdiction also requires that there must be a consideration to support the oral modification of a written agreement.

Pleasant v. Arizona Storage Co., (1928) 34 Ariz. 68 at 76, 267 Pac. 794.

It is our position that all of the requirements of Arizona law were met under the facts of this case. One of the Respondents testified and very clearly indicated that Respondents knew exactly what they were doing when they agreed to take the $125,000.00 and have their payments accelerated. The Respondent, Fernando De Saracho, testified that he was told by Mr. Horwath that unless Petitioner could collect all of the money during that year there would be no further monies paid by way of advances. Respondent stated that he understood that was the situation and with that understanding in mind he and his brother took the $125,000.00 as well as the additional $400,000.00 in accelerated payments.

III.
Finding of District Court Not Saved by Rule 52(a) F.R.C.P.

It is the uniform rule of federal law that where there is no substantial evidence to support the findings of fact made by a court it is the duty of the appellate court to determine that such findings are clearly erroneous within the meaning of the rule.

James Julian, Inc. v. Town of Elkton, 341 F. 2d (CA 4, 1965);

Federal Security Insurance Co. v. Smith, 259 F. 2d 294 (CA 10, 1958);

Miller v. C. I. R., 203 F.2d 350 (CA 6, 1953).

IV.

The Court of Appeals Erred in Not Ordering Judgment Reduced.

Since the entry of the trial court's findings of fact two $60,000.00 notes payable by Respondents to Petitioner, together with interest and attorney's fees, became due and payable. The final note will become due and payable on December 31, 1975. It seems that there would be a multiplicity of legal proceedings resulting from the affirmance of such a judgment and that the practical solution to this problem would have been for the appellate court to have ordered the trial court to credit the accruals against the judgment, even if the appellate court believed that there had been no executed oral agreement, as it would be, in effect, a taking of Petitioner's property without due process of law if Respondents can come in and collect the entire amount of the judgment when, in fact, Respondents owe Petitioner a substantial amount of said judgment.

Conclusion.

While this might be only a simple diversity case, it is our view that a miscarriage of justice has occurred and that no court but this Court can correct that miscarriage of justice. If the purpose of our legal system is to bring about the dispensation of justice between man and man, then that system has miserably failed if one litigant can walk away after collecting $267,000.00 from another litigant when it is specifically and notori-

ously admitted that the litigant collecting the money owes the other $180,000.00, plus interest and attorney's fees. Such a result is, in effect, a travesty on justice and there must be some court in the land that can correct judicial error resulting in such a miscarriage of justice.

It is respectfully submitted that for the foregoing reasons this Petition for Writ of Certiorari should be granted.

Dated: May 27, 1975.

Respectfully submitted,

BERTRAM H. ROSS,
Counsel for Petitioner.

APPENDIX.

Memorandum.

United States Court of Appeals, for the Ninth Circuit.

Cesar De Saracho and Fernando De Saracho, dba Saracho Hnos, Plaintiff-Appellees, vs. S & H Packing Co., Inc., Defendant-Appellant. No. 73-3217.

Appeal from the United States District Court for the District of Arizona.

Before: CARTER and WRIGHT, Circuit Judges, and EAST, Senior District Judge.*

This is a diversity action brought by the appellees, citizens of Mexico, against the appellant, a California corporation doing business in Arizona. The litigation involves alleged written and oral contractual rights and duties among the parties in a tomato raising venture in Mexico with an interlinking marketing enterprise in the United States.

The appellant appeals from a judgment in favor of the appellees following an extensive evidentiary trial by the court. We affirm.

Two of appellant's assignments of error deserving of discussion are:

A. The District Court's finding and conclusion that the December 31, 1970 written agreement was not modified by an executed oral agreement accompanied by the payment of $125,000 to appellees was not supported by the evidence.

B. The District Court as a matter of law erroneously gave judgment against appellant for $180,000 of appellant's own money.

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*Honorable William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.

The appellant also asserts three additional assignments of error, two of which deal with evidentiary rulings and the third with an item of private indebtedness of one of the appellee's partners. We concluded from our examination of the record that each of those three additional assignments of error is wholly without merit.

Assignment of Error A:

The appellant in its assertion of an executed oral modification of the written agreement carried the burden of proving these two elements: First, a mutual intention on the part of the parties to modify the contract. *Yeazell v. Copins,* 98 Ariz. 109, 116, 402 P.2d 541, 545 (1965). Second, that any such intended modification was supported by additional consideration. *Pleasant v. Arizona Storage & Distributing Co.,* 34 Ariz. 68, 76, 267 P. 794, 797 (1928).

The evidence presented by the parties was conflicting. The District Court had the advantage of seeing and hearing the witnesses in person and had full opportunity to judge their credibility. The District Court's findings of fact are definite and explicit in finding adversely to all of the appellant's contentions of fact. We conclude from the record that the District Court's findings of fact rejecting the contention of an oral modification of the written contract are amply supported by relevant evidence, and we are not convinced that they are clearly erroneous. Fed. R. Civ. P. 52(a); *Sessions, Inc. v. Morton,* 491 F.2d 854, 858 (9th Cir. 1974).

Assignment of Error B:

When the District Court found that there was no mutually agreed modification of the December 31, 1970 written agreement, *a fortiori,* the appellant's claim of right under the modification to accelerate the payment date of the appellees' then unaccrued installment payments under the written contract collapsed, and the appellant's unilateral withholding of the sum of $180,000 then due appellees on the accounting for crop profits was a tortious conversion. The District Court applied the correct measure of damage for that conversion. *Markel v. Transamerica Title Insurance Company,* 103 Ariz. 353, 442 P.2d 97, 104 (1968); *Phelps v. Melton,* 14 Ariz. App. 296, 297, 482 P.2d 905, 906 (1971); and *Higgins v. Arizona Savings and Loan Association,* 90 Ariz. 55, 63, 365 P.2d 476, 482 (1961).

The judgment of the District Court dated and filed on September 17, 1973 is affirmed.

AFFIRMED.

Supreme Court, U. S.
FILED
JUN 28 1975
MICHAEL RODAK, JR., CLERK

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vs.

CESAR DE SARACHO and FERNANDO DE SARACHO, dba SARACHO HNOS.,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

RESPONSE

Anthony D. Terry
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Tucson, Arizona 85702
Counsel for Respondent

Dated: June 26, 1975

IN THE

Supreme Court of the United States

October Term, 1974
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Petitioner,

vs.

CESAR DE SARACHO and FERNANDO DE SARACHO, dba SARACHO HNOS.,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Respondents pray that the Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above entitled case on March 21, 1975, be denied.

Statement of the Case

Respondents respectfully disagree with the Petitioner's statement of the case, in that it does not set forth the true nature of the issues, as litigated in the United States District for the District of Arizona or the Court of Appeals for the Ninth Circuit. The Respondents therefore wish to correct the statement of the case and add the following:

The true nature of Respondents' claim against Petitioner is that Petitioner wrongfully converted Respondents' money by accelerating payment due on promissory notes pursuant to the written contract executed on December 31st, 1970.

Petitioner's sole defense to this wrongful conversion is

that there was an oral modification of the agreement arising from the provision of certain monies to the Respondent. However, Petitioner provided these monies to Respondents pursuant to the agreement which obligated Petitioner to furnish these monies to the Respondents and which was entered into at the same time the written agreement of December 31st, 1970 was executed. Petitioner's agent, Robert Horwath admitted in his deposition that Petitioner was to furnish whatever money was necessary to finance Respondents' farming operations.

In March of 1971, Respondents were unable to meet their payroll and had to make other expenditures to finance the tomato crop operations. Pursuant to the aforementioned mutual oral agreement, Respondents requested financial backing from the Petitioner.

The Petitioner acting through its president, Robert L. Horwath, met with Respondents in Nogales, Arizona, at which time Mr. Horwath agreed to provide $125,000.00 plus some additional monies to the Respondents. However, this offer was accompanied by conditions which were totally unacceptable to the Respondents. Unable to come to an agreement, on or about March 31st, 1971, both parties shut down their operations.

The next day, Petitioner did agree to furnish $125,000.00 immediately to the Respondents and to pay additional weekly increments of money to the Respondents to finance the farming operations. There was no agreement to accelerate the notes due under the December 31st, 1970 contract.

The District Court and the Court of Appeals found that no other agreement or oral modification was made at that time. Since the affirmative defense of oral modification collapsed, the Court of Appeals entered a judgment for tortious conversion against the Petitioner for unilaterally withholding $180,000.00 then due to the Respondents on the account for crop profits.

It is Respondents' position that the monies furnished by Petitioner to Respondents was pursuant to a prior mutual agreement. Petitioner cannot show that any additional consideration was furnished or that there was a mutual intent of the parties to form an oral modification. The District Court's findings, as affirmed by the Court of Appeals, should not be disturbed and Petitioner's Writ of Certiorari should be denied.

REASONS FOR DENYING THE WRIT

I

PETITIONER TORTIOUSLY CONVERTED RESPONDENTS' PROPERTY BY BREACHING THE DECEMBER 31, 1970 CONTRACT, WHICH WAS NOT ORALLY MODIFIED.

According to the December 31, 1970 contract, Respondents' payment to Petitioner for his partnership interest was to be a series of promissory notes due and payable in annual installments between March 31, 1971 and December 31, 1975. In June of 1971, Petitioner breached the contract terms and was guilty of tortious conversion when he accelerated the payment of the notes and withheld money due to Respondents on account at that time. In affirming the District Court's opinion, the Court of Appeals stated:

> "... appellant's unilateral withholding of the sum of $180,000.00 then due appellees on the accounting for crop profits was a tortious conversion." (Petitioner's Appendix at 3)

Petitioner contends that there was no tortious conversion because of an oral modification of the contract, by which Petitioner would advance Respondents certain sums of money during the growing season and Respondents would accelerate to June of 1971 the payment of their promissory notes under the December 31, 1970 contract.

The Court of Appeals affirmed the District Court's opinion in finding that there was no oral modification and stated:

> "We conclude from the record that the District Court's findings of fact rejecting the contention of an oral modification of the written contract are amply supported by relevant evidence ...." (Petitioner's Appendix at 2)

Petitioner claims that the District Court's finding as affirmed by the Court of Appeals are wholly without merit. However, the facts deny Petitioner's conclusion. An oral modification of a written contract demands the presence of two elements. The Court of Appeals stated these elements in its opinion:

> "The appellant in its assertion of an executed oral modification of the written agreement carried the burden of proving these two elements: First, a mutual intention on the part of the parties to modify the contract. Yeazell v. Copins, 98 Ariz. 109, 116, 402 P.2d 541, 545 (1965). Second, that any such intended modification was supported by additional consideration. Pleasant v. Arizona Storage & Distributing Co., 34 Ariz. 68, 76, 267 P. 794 (1928) Petitioner's Appendix at 2)

Petitioner did not show that both elements were present.

First, there was no mutual intent to make an oral modification. At the trial all of the Respondents testified that they had no such intention.

Petitioner cites apparently conflicting testimony by Fernando de Saracho to show mutual intent. But mere conflicting testimony will not support a grant of appeal. Credibility is for the trial court to decide. The Court of Appeals noted this when it stated:

> "The evidence presented by the parties was conflicting. The District Court had the advantage of seeing and hearing the witnesses in person and had full opportunity to judge their credibility. The District Court's findings of fact are definite and explicit in finding adversely to all of the appellant's contentions of fact." (Petitioner's Appendix at 2)

Second, there was no additional consideration. Petitioner's agent, Robert Horwath, admitted that he had agreed to supply Respondents with whatever money was required to back Respondent's farming operation. The payment to Respon-

dents accorded with this agreement. It is obvious that additional consideration for oral modification cannot consist of whatever is already due and owing. Pleasant v. Arizona Storage & Distribution Company, 34 Ariz. 60, 77, 267 P. 794, 797 (1928). Since Petitioner was obligated to furnish Respondents with whatever money was necessary, the money supplied was not additional consideration.

In fact what occurred was a case of financial extortion. Petitioner held money belonging to the Respondents. Respondents relied on Petitioner's agreement to supply financial backing for the venture. Petitioner than put a financial squeeze to the Respondents and refused to forward any further money to them unless they agreed to accelerate the notes and thereafter asserted there had, in fact, been a modification of the written agreement. Respondents' rejection of the offer and subsequent stopping of operations was a justifiable reaction to this financial pressure. Petitioner's ultimate provision of the money occured because of his prior legal obligation to Respondents.

Upon these facts, the District Court found there was no mutually agreed modification of the December 31, 1970, written agreement. Therefore, the withholding of money due Respondents was a tortious conversion. The Court of Appeals reached this conclusion when it stated:

> "When the District Court found that there was no mutually agreed modification of the December 31, 1970 written agreement, a fortiori, the appellant's claim of right under the modification to accelerate the payment date of the appellees' then unaccrued installment payments under the written contract collapsed, and the appellant's unilateral withholding of the sum of $180,000.00 then due appellees on the accounting for crop profits was a tortious conversion." (Petitioner's Appendix at 3)

II

THE FINDING OF THE DISTRICT COURT SHOULD NOT BE DISTURBED.

The Ninth Circuit has adopted the "clearly erroneous" rule regarding findings of fact pursuant to Rule 52(a) of the Federal Rules of Civil Procedure requring that:

> "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge and the credibility of the witnesses." Federal Rules of Civil Procedure, Rule 52(a).

The Petitioner's total lack of proof of an oral modification cannot possibly mean that the findings of the District Court were "clearly erroneous". The findings should not be disturbed.

III

THE COURT OF APPEALS HAS NO JURISDICTION TO REDUCE THE JUDGMENT.

Petitioner requests that the Court of Appeals reduce the judgment against the Petitioner by an amount equal to two $60,000.00 promissory notes which allegedly became payable by Respondents to Petitioner between the entry of the trial court's findings of fact and the Court of Appeal's entry of judgment.

The Court of Appeals has no jurisdiction to grant relief beyond the facts set forth in the trial record. This was not at issue at trial and cannot therefore be resolved on appeal.

If in fact Respondents do owe money on these notes and have defaulted, Petitioner may initiate appropriate litigation.

CONCLUSION

The Petitioner in this action tortiously converted Respondents' money. Petitioner's only defense was that there was an oral modification of a written contract. Relying on a multiplicity of facts, the District Court found that there was no such oral modification. Petitioner is simply trying to retry this case and have another day in court. This does not constitute cause for granting a Writ of Certiorari. Moreover, Petitioner is asking this Court to grant relief beyond its jurisdiction.

It is respectfully submitted that for the foregoing reasons this Petition for Writ of Certiorari should be denied.

DATED this 26th day of June, 1975.

Respectfully submitted,

Anthony D. Terry

ANTHONY D. TERRY
Counselor for Respondents